3140
(1)
FILED
AUG 2 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

3145 ≠ 9
CHI-COM

No. 333

IN THE MATTER OF
CHICAGO AND EASTERN ILLINOIS RAILWAY COMPANY, A CORPORATION,

Debtor.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, A CORPORATION (SUBSTITUTED FOR BENJAMIN WHAM, TRUSTEE),

Petitioner,

vs.

ARTHUR F. GOURLEY,

Respondent.

PETITION FOR THE WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GEORGE I. HAIGHT,
K. L. RICHMOND,
Attorneys for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

INDEX.

	PAGE
Petition for Writ of Certiorari	1
A. Summary Statement of the Matter Involved	2
B. Jurisdiction	7
C. Questions Presented	7
D. Reasons for Allowance of the Writ	9
Brief	11
Opinions Below	11
Jurisdiction	11
Statement of the Case	11
Specification of Errors	11
Summary of Argument	12
Argument	14
I. The State Court Judgment Is Not Conclusive in the Bankruptcy Court	14
A. Section 77j applies only to claims arising prior to adjudication. Claims for personal injuries arising after the adjudication and allegedly due to negligent operation of the railroad are administrative expenses governed by Section 62(a) of the Bankruptcy Act (11 U. S. C. 102)	14
B. If Section 77j applies to claims arising after adjudication, that section does not negative the requirement of Section 77 c-7 (11 U. S. C. 205 c-7) that the bankruptcy court shall "fix * * * the manner in which such claims (i. e., claims of creditors) may be filed or evidenced and allowed"	14

32528

C. In view of Section 77(a), which gives the bankruptcy court "exclusive jurisdiction of the debtor," the debtor's estate is not bound by the state court judgment entered against the naked debtor corporation..... 15

D. Section 66 of the Judicial Code (28 U. S. C. 125) does not apply to a proceeding under Section 77 of the Bankruptcy Act..... 16

II. The District Court's Order Is Not Appealable.. 16

A. Section 24 of the Bankruptcy Act, as amended, retains the distinction between "controversies" and "proceedings"..... 16

B. This is a "controversy" 17

C. In a "controversy," only a final order is appealable 17

D. The District Court's order is not final.... 18

E. Even if this is a "proceeding," the District Court's order is not appealable because it is not "interlocutory" within the meaning of Section 24 of the Bankruptcy Act..... 18

Appendix (Pertinent Statutes) 19

Table of Authorities.

Cases.

Anderson v. Scandrett, 19 Fed. Supp. 681 16
Breyer Printing Co., In re, 216 Fed. 878, 880 .....13, 17
Dickinson Co. v. Cowan, 309 U. S. 382 17
James A. Brady Foundry Co., In re, 3 Fed. (2d) 437 .. 14
James Butler Grocery Co., In re, 12 Fed. Supp. 851 ... 16
McDonald v. Mabee, 243 U. S. 90 15
Paramount Publix Pictures Corp., In re, 85 Fed. (2d) 42 15
Riehle v. Margolies, 279 U. S. 218 15
Rodbaugh v. Denny, 24 Fed. Supp. 1011 15
Torgovnick, In re, 49 Fed. (2d) 211 .....13, 17
Winton Shirt Corp., In re, 104 Fed. (2d) 777 .....12, 16, 18

Statutes.

Section 24 of the Bankruptcy Act (11 U. S. C. 47) 2, 5, 7, 8, 9, 12, 13, 16, 17, 18
Section 57K of the Bankruptcy Act (11 U. S. C. 93K) .. 18
Section 62(a) of the Bankruptcy Act (11 U. S. C. 102) 7, 12, 14
Section 77 of the Bankruptcy Act (11 U. S. C. 205) ...2, 8, 9
Section 77(a) of the Bankruptcy Act (11 U. S. C. 205(a)) 12, 15
Section 77(c-7) of the Bankruptcy Act (11 U. S. C. 205c-7) 7, 12, 14
Section 77(j) of the Bankruptcy Act (11 U. S. C. 205j) 2, 6, 7, 12, 14

Section 77 (l) of the Bankruptcy Act (11 U. S. C. 205 (1)) 14

Section 66 of Judicial Code (28 U. S. C. 125) 8, 12, 16

Section 240(a) of Judicial Code (43 Stat. 938, 28 U. S. C. 347a) 7

Rule 52(a) of the Rules of Civil Procedure (28 U. S. C. following 723c) 8

TEXTS.

Collier on Bankruptcy, 14th Ed. Vol. 2, pp. 734-5 17

Finletter on Bankruptcy Reorganization, 1939, pp. 609-610 17

Gerdes, Corporate Reorganizations, 52 Harvard Law Review, 1, 37 17

Moore, Bankruptcy Manual, 1939, pages 88, 95-97 17

Remington on Bankruptcy, 4th Ed. Vol. 8, 1939 Supplement, p. 37, Sec. 3704 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

In the Matter of
CHICAGO AND EASTERN ILLINOIS RAILWAY COMPANY, A CORPORATION,

Debtor.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, A CORPORATION (SUBSTITUTED FOR BENJAMIN WHAM, TRUSTEE),

Petitioner,

vs.

ARTHUR F. GOURLEY,

Respondent.

PETITION FOR THE WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Chicago & Eastern Illinois Railroad Company, petitioner, prays for the writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment and order of that Court entered June 11, 1941 (R. 139-140).

The Senior Circuit Judge for the Seventh Circuit, speaking for the Court below, stated that this bankruptcy case "presents some amazingly unsettled questions" (R. 137). The questions are of public importance. Their significance goes far beyond this case. Broadly stated, the questions involve the proper construction of Section 24 of the Bankruptcy Act (11 U. S. C. 47) relating to appeals, and the proper construction of certain sections of the Act relating to administrative expenses and claims, particularly Section 77j in respect to "suits or claims for damages caused by the operation of trains, busses, or other means of transportation."

The statutes herein involved are set forth in the Appendix hereto, page 19 *et seq.*

A.

Summary Statement of the Matter Involved.

1. The review sought involves a claim filed by respondent, Arthur F. Gourley, hereinafter referred to as "claimant", against the Estate of Chicago and Eastern Illinois Railway Company, a corporation, Debtor, in a proceeding for reorganization of said company in the District Court for the Northern District of Illinois, Eastern Division, under Section 77 of the Bankruptcy Act (11 U. S. C. 205). Petitioner is a recently organized corporation to which the assets of the Debtor were transferred for the purpose of carrying out the plan of reorganization (R. 141). The District Court has entered a final decree terminating the reorganization proceedings, except as to the instant claim, and discharging the Trustee (R. 141-2). After said final decree, petitioner was substituted for the Trustee in the proceeding on this claim (R. 144).

2. The events giving rise to this controversy are as follows:

March 3, 1933—Section 77 of the Bankruptcy Act

providing for the reorganization of railroads became effective.

April 18, 1933—Petition for reorganization filed by the Debtor, Chicago and Eastern Illinois Railway Co., and approved (R. 8, 75). The Debtor was continued in possession (R. 8, 75).

August 3, 1933—Collision occurred between train operated by Debtor in possession and train operated by Illinois Central Railroad; claimant, engineer of Illinois Central train, suffered personal injuries (R. 5, 75).

September 15, 1933—Trustee of the Estate of the Debtor was appointed (R. 8, 75).

June 20, 1934—Claimant instituted suit in the Superior Court of Cook County, Illinois, against the Trustee for personal injuries alleged to have been suffered as a result of the Trustee's negligence (R. 5, 21, 75). The District Court entered no order authorizing or consenting to the liquidation of the claim in the state court. The Trustee filed an answer in the state court denying that he was operating the road at the time of the accident (R. 10, 27). Claimant thereupon filed an "additional count" in the state court naming both the Trustee and the Debtor as defendants, to which the Debtor answered and the Trustee moved to dismiss himself as a party on the ground that the alleged tort was committed before his appointment and he, therefore, was not liable (R. 14, 52, 58, 65). No order was ever entered on the Trustee's motion to dismiss (R. 16-17). Subsequently, claimant filed an amended complaint seeking relief against the Debtor only (R. 15). The Debtor filed an answer and on these pleadings the case was tried (R. 16).

June 18, 1938—State court judgment for $60,000 entered against Debtor (and not against Trustee) (R. 20, 75), upon direction of Illinois Appellate Court (R. 34-51; 295 Ill. App. 160). The record shows that the Trustee paid for the defense in the state court out of the Debtor's estate under "the general order" of the bankruptcy court; there was no specific order covering the fees (R. 13). The record also shows that

state court summons was served on an attorney in the legal department of the Debtor (R. 12-13).

December 1, 1938—Claimant filed proof of claim in the reorganization proceedings in the District Court (R. 2-4); the claim was referred to a Special Master with directions to hear the claim and report thereon (R. 2).

3. At the hearing before the Master, counsel for claimant and the Trustee agreed, upon the suggestion of the Master, that a preliminary report be made to the District Court for determination of the question of whether the state court judgment is conclusive (R. 68). The claimant put in evidence a certified copy of the state court judgment (Claimant's Exhibit 1, R. 19-20) and certain exhibits relating thereto, to-wit, abstract of state court record (Claimant's Exhibit 2), complaint in the state court (Claimant's Exhibit 3, R. 21-27), answer thereto of Trustee (Claimant's Exhibit 4, R. 27-33), notice of Supreme Court of Illinois of denial of petition for leave to appeal (Claimant's Exhibit 5, R. 34), and opinion of Appellate Court of Illinois (Claimant's Exhibit 6, R. 34-51). Claimant has not offered any evidence on the merits. *Claimant has not rested.*

4. The Master filed a preliminary report (R. 67) and an opinion (R. 69). The Master recommended that the state court judgment be held not conclusive (R. 67-68) because the state court suit was not authorized by the bankruptcy court as the manner of liquidation of the claim and the Trustee was not a party to the state court suit (R. 111). Claimant filed objections to the Master's Report in the District Court (R. 112).

5. The District Court overruled claimant's objections and confirmed the Master's Report (R. 114). The District Court's order, *inter alia,* provided (R. 114):

> "* * * the judgment obtained in the Superior Court of Cook County in favor of the claimant and against the Chicago and Eastern Illinois Railway

> Company, Debtor, founded on a tort committed by the Debtor while it was continued in possession under order of the court and before a trustee was appointed, in suit commenced after the appointment of the Trustee, and prosecuted without the order, direction, or consent of this Court, does not constitute a liquidation of the claim for the purpose of proof and allowance in these proceedings."

The District Court's order also contained the following (R. 114):

> "It is Further Ordered, Adjudged, and Decreed that the claim be sent back to the Special Master for hearing on the merits apart from the judgment itself and for a further report thereon."

The District Court did not enter findings of fact and conclusions of law. The District Court's order did not reject the claim. Nevertheless, claimant appealed to the Court of Appeals (R. 115).

6. In the Court of Appeals the Trustee filed a motion to dismiss the appeal on the grounds (1) that the Court of Appeals had no jurisdiction under Section 24 of the Bankruptcy Act (11 U. S. C. 47) because the District Court's order is not appealable, and (2) that claimant had failed to furnish a proper record including findings of fact and conclusions of law (R. 128). The Court of Appeals denied the motion (R. 140). The Court stated the following "bases" for its holding (R. 138):

> "(1) The distinctions between 'proceedings in bankruptcy' and 'controversies arising in bankruptcy proceedings' as they originally existed in Section 24 of the Bankruptcy Act, have been eliminated by the Chandler Act. *Dickinson Co.* v. *Cowan*, 309 U. S. 387. See also the Senate Committee Report.
>
> (2) The decree (or order) of the District Court is a final decree, at least in part, and therefore under any circumstances is appealable.
>
> (3) The order is appealable under Section 24, even though it were not a final order.

(4) The litigation on this claim, which arose after adjudication of debtor, and out of the operation of the debtor, is a proceeding in bankruptcy, and an appeal lies from an adverse order made therein, whether said order is final or interlocutory. The fact that the claim arose out of the operation of the railroad *after the adjudication* is significant.

(5) Plaintiff's claim is in the nature of an administrative expense, which would, were it not for the proviso of Section 77(j) be subject to the court's approval. Section 77(j), upon the facts here shown, takes from the District Court all controversy as to amount where there has been a trial and a judgment in another court of competent jurisdiction. Its nature and status as an administrative expense, rather than a claim of a creditor against the debtor who later is adjudged a bankrupt, serves to emphasize its 'proceeding in bankruptcy' character, from an order in which an appeal will lie, whether final or interlocutory."

7. On the merits, the Court of Appeals reversed the District Court's order, with directions to proceed in accordance with the views expressed (R. 139-140). The Court of Appeals held (1) that under the proviso of Section 77(j) of the Bankruptcy Act (11 U. S. C. 205j) a claim arising after approval of the petition out of the operation of a train, bus, or other means of transportation may be liquidated in any court of competent jurisdiction without the authorization or consent of the Bankruptcy court; and (2) that if Section 77(j) requires the consent of the bankruptcy court for such liquidation, the consent "need not be evidenced by formal order", and "implied consent" is found here in the bankruptcy court's "action in authorizing the defense of this case in the state court and the payment of the costs of such defense" (R. 135-6).

B.

Jurisdiction.

The jurisdiction of this Court is sustained by Section 24(c) of the Bankruptcy Act (52 Stat. 854, 11 U. S. C. 47c), and by Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. 347a). The judgment and order of the Court of Appeals were entered on June 11, 1941 (R. 139-140). No petition for rehearing was filed in that Court. The present petition is filed within three months of the entry of the judgment and order of the Court of Appeals.

C.

Questions Presented.

1. Under Section 77(j) of the Bankruptcy Act, may a claim for operating expenses arising after the adjudication out of the operation of a train be liquidated in any court of competent jurisdiction without the authorization or consent of the bankruptcy court, and is a judgment obtained in such liquidation binding on the bankruptcy court?

2. Does the proper construction of Section 77(j) limit that section to claims arising before the adjudication, and are administrative expenses arising after the adjudication governed by Section 62(a) of the Bankruptcy Act (11 U. S. C. 102) which provides that administrative expenses shall be "examined and approved or disapproved by the (bankruptcy) court"?

3. If the proviso of Section 77(j), properly construed, applies to claims arising after the adjudication, does Section 77(c-7) require that the bankruptcy court authorize and consent to the liquidation of such claim in another court?

4. If the authorization and consent of the bankruptcy court in a reorganization proceeding under Section 77 of the Bankruptcy Act is required for liquidation in another court of a claim arising after the adjudication out of the operation of a train, was such authorization and consent given here?

5. Is the debtor's estate in this case bound by the state court judgment against the naked debtor corporation entered after the appointment of the Trustee?

6. Does Section 66 of the Judicial Code (28 U. S. C. 125) permit that a claim arising after an adjudication under Section 77 of the Bankruptcy Act be liquidated in another court without leave of the bankruptcy court?

7. Is the District Court's order that the state court judgment is not conclusive and sending the claim back to the Master for hearing on the merits, appealable under Section 24 of the Bankruptcy Act?

8. Is the old distinction between "controversies" and "proceedings in bankruptcy" abolished under the present Section 24 of the Bankruptcy Act?

9. If the old distinction is not abolished, is this a "controversy" or a "proceeding" under Section 24 of the Bankruptcy Act?

10. If the old distinction is not abolished and if this is a "controversy", is the District Court's order appealable under Section 24 of the Bankruptcy Act as "a final decree, at least in part"?

11. If the old distinction is not abolished and if this is a "proceeding", is the District Court's order appealable as an "interlocutory" order within the meaning of Section 24 of the Bankruptcy Act?

12. Was it proper for the Court of Appeals to consider the appeal in view of the fact that the District Court did not, as required by 52(a) of the Rules of Civil Procedure (28 U. S. C. following 723c), enter findings of fact and conclusions of law?

D.

Reasons for Allowance of the Writ.

1. *Importance of decision on construction of Section 77 of the Bankruptcy Act.* The large number of railroads being reorganized under Section 77 emphasises the public importance of a decision by this Court settling the procedure on liquidation of claims arising after adjudication out of the operation of trains, busses, or other means of transportation. Contrary to the opinion of the court below (R. 134-135), the questions are not limited to personal injury claims, but apply as well to claims for damage to property arising out of the operation of trains, etc. Petitioner submits that the decision below will greatly impede the reorganization of railroads under Section 77 and handicap the bankruptcy courts in prompt and efficient disposal of such proceedings. Under the decision below, other creditors are not advised by the bankruptcy record as to when and how claims arising out of the operation of trains, etc. are being liquidated. The bankruptcy court cannot adequately control the disposition of such claims. The decision below is upon important questions of Federal law which have not been, but should be, settled by this Court.

2. *Importance of decision on construction of Section 24 of the Bankruptcy Act relating to appeals.* As pointed out in the brief in support hereof (p. 16, *post*), the decision of the Court below in respect to the appealability of the District Court's order is in conflict with a decision of the Circuit Court of Appeals for the Third Circuit. The public importance of the questions is patent. The questions are not limited to appeals in proceedings under Section 77. Most of the appeals in bankruptcy proceedings arise under Section 24. The Court below has decided important questions of Federal law which have not been, but should be, settled by this Court.

WHEREFORE, your petitioner prays that the writ of certiorari issue to the Circuit Court of Appeals for the Seventh Circuit for the purpose of reviewing the questions herein specified; that the judgment of the said Court of Appeals be reversed; and that petitioner be granted such other and further relief as to this Honorable Court shall seem meet.

GEORGE I. HAIGHT,
K. L. RICHMOND,
Attorneys for Petitioner.